No. 21,888

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER
and
CASCADE EMPLOYERS ASSOCIATION, INC., INTERVENOR
v.
SALEM BUILDING TRADES COUNCIL, AFL-CIO,
RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon the petition of the Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151 *et seq.*),[1] for enforcement of its order issued against respondent on February 20, 1967 (R. 32–43) [2] and reported at 163 NLRB No. 9. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred in Salem, Oregon, within this judicial circuit.

[1] Pertinent provisions of the Act are set forth *infra*, pp. 25–26.

[2] "R." references are to pages of Volume I of the record as reproduced according to Rule 10 of the Rules of this Court.

STATEMENT OF THE CASE

I. The Board's Findings of Fact [3]

The Board found that respondent Salem Building Trades Council (hereinafter, "the Union") was engaged in a labor dispute with a general contractor in the building industry. The Board further found that the Union picketed at the premises of neutral employers with an object of forcing those employers, and other persons who regularly do business with the general contractor, to cease doing business with the general contractor, in violation of Section 8(b)(4)(ii)(B) of the Act. The subsidiary facts may be summarized as follows:

Since January 1963, the Union has had a labor dispute with Reimann Construction Co., a general contractor in the building and construction industry, over the wages and working conditions of laborers employed by Reimann (R. 34; 24). In April 1965, Reimann was engaged by Northbridge Industries—owner and operator of a chain of motels—to build a new motel called the Hyatt Lodge (R. 33, 34; 23–24). Thereafter, the Union notified the Oregon State Building and Construction Trades Council (a labor organization), of Reimann's presence on the Hyatt Lodge project. On May 27, 1965, the Oregon State Building and Construction Trades Council informed Northridge by letter that Reimann was considered an "unfair" employer by both the Oregon State Council and the Union.

[3] The facts in this case are undisputed. Before the Board, the parties entered into a stipulation of facts, waived proceedings before a Trial Examiner, and agreed that the case could be submitted directly to the Board itself for decision (R. 22).

The letter added that unless nonunion firms were removed from the Hyatt Lodge project, Northridge itself could be placed "on the official unfair list and do not patronize list of the entire labor movement in the State of Oregon" (R. 24–25; 29).

Reimann was not removed from the Hyatt Lodge project, however. It completed its contract for Northridge using nonunion carpenters and laborers, and left the premises on October 11, 1965. Hyatt Lodge thereupon opened for business (R. 34; 25). The Union did not picket the premises during the construction period, nor was Northridge placed on any unfair list or do not patronize list by any Oregon labor organization (R. 25).

Candelaria Investment Co. is an Oregon corporation; it owns, operates and leases retail store buildings at a location called the Candelaria Shopping Center in Salem, Oregon. In June 1965, Candelaria engaged Reimann to construct a building at the Shopping Center. Reimann also performed this contract with nonunion carpenters and laborers, and completed work by October 14, 1965 (R. 34; 25, 30). Candelaria's tenant at the new building was Farrell's Ice Cream Parlor; Farrell began retail operations on November 9, 1965 (*Ibid.*).

It was undisputed that the Union had no labor dispute with Northridge, Hyatt Lodge, Farrell, or Candelaria (R. 34; 24). Nonetheless, from November 8 to December 20, 1965, the Union picketed at the premises of Hyatt Lodge; and between November 9 and November 15, 1965, the Union picketed sporadically at Farrell's premises (R. 34–35; 25, 26). At both

locations, the picketing did not begin until after Reimann and his employees had permanently left the premises (R. 35; 25). At both locations, the picketing occurred during regular business hours while the occupant of the premises was engaged in normal business operations. The pickets, who confined their patrolling to the area around the customer or consumer entrances, carried picket signs displaying the following legend (R. 35; 25–26):

THIS
BUILDING
BUILT UNDER
SUB-STANDARD
WAGES AND CONDITIONS
BY
REIMANN CONSTRUCTION COMPANY

SALEM BUILDING TRADES COUNCIL

The picketing did not cause any cessation of work by employees working at the picketed premises or by deliverymen servicing those establishments (R. 27).

Hyatt Lodge and Reimann are members of Cascade Employers Association, Inc. The Association filed the instant unfair labor practice charges on their behalf and the General Counsel issued the instant complaint on December 17, 1965. After the General Counsel had commenced proceedings under Section 10(1) of the Act in the United States District Court for the District of Oregon, the parties entered into a stipulation on December 20, 1965, pending final disposition of the complaint by the Board, and the picketing stopped (R. 25).

II. The Board's Conclusions and Order

The Board concluded that the Union's picketing violated Section 8 (b)(4)(ii)(B) of the Act. In the Board's view, the record in this case showed that an object of the picketing, which concededly occurred at the premises of neutral employers, was to force them and other persons to cease doing business with Reimann. In so ruling, the Board rejected the Union's contentions that (1) no violation could be found here because there was no existing business relationship between Reimann and the other employers involved (R. 35–37); (2) the U.S. Constitution privileged the picketing because it had an "informational" purpose (R. 35); and (3) the picketing was immunized by the Supreme Court's consumer picketing doctrine enunciated in *N.L.R.B.* v. *Fruit & Vegetable Packers Local 760* (*Tree Fruits*), 377 U.S. 58 (R. 37, 39).

Accordingly, the Board ordered the Union to cease and desist from threatening, coercing or restraining the named employers or any other persons with an object of forcing them to cease using Reimann's products or to cease doing business with Reimann in a manner prohibited by Section 8(b)(4)(ii)(B). The order also requires the Union to post an appropriate notice at its business offices and meeting halls in Salem, and to provide signed copies of the notice for the named employers to post at their premises.

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ARGUMENT

The Board properly found that the union threatened, coerced, and restrained neutral persons with an object of forcing them to cease using Reimann's products, or to cease doing business with Reimann, thereby violating Section 8(b)(4)(ii)(B)

The stipulated facts establish that the Union had a labor dispute with Reimann, a building contractor; that it engaged in picketing at retail premises built by Reimann after the latter and his employees had completed their work and left the premises; and that the picketed premises were then being operated by other, admittedly neutral, employers. At first blush, therefore, this case presents a classic situation cognizable under Section 8(b)(4)(B). For that statutory provision, as the Supreme Court has only recently reiterated, was designed to prohibit "pressure tactically directed toward a neutral employer in a labor dispute not his own." *National Woodwork Mfrs. Ass'n et al.* v. *N.L.R.B.*, 386 U.S. 612, 623.[4]

The occurrence of picketing at premises occupied solely by neutral employers usually gives obvious and persuasive support to an inference that the union was deliberately seeking to enmesh innocents in its dispute with the primary employer. Nonetheless, the Union contended before the Board, its conduct in

[4] Section 8(b)(4)(B), formerly Section 8(b)(4)(A), makes it an unfair labor practice for a union to "induce or encourage" neutral employees to engage in a work stoppage or to "threaten, coerce, or restrain" a neutral employer, with an object of forcing "any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person." The full text of Section 8(b)(4)(B) and other relevant statutory provisions appears *infra*, pp. 25–26.

this case was lawful. We shall discuss each of the Union's arguments *seriatim*.

A. The contention that the Union did not "threaten, coerce or restrain" the picketed employers

Before the Board, the Union contended that the record would not permit a finding that it had engaged in the precise kinds of conduct described in Section 8(b)(4)(B). Specifically, the Union argued, there could be no finding that the neutral employers were threatened, coerced or restrained within the meaning of subsection (ii) of 8(b)(4)(B) because there was no proof of injury or adverse effect to them as a result of the picketing.[5]

The legislative history of this subsection and its uniform interpretation by the Board and courts compel the rejection of the Union's argument.

Under the law before the 1959 amendments, a union was not permitted to call a strike at a neutral employer's premises in support of a forbidden cease-doing-business object; however, nothing in the Act prevented a union from approaching the neutral employer directly and threatening him with labor troubles in order to achieve the same boycott results. Congress sought to eliminate this loophole by adding subsection (ii) to the Act in 1959. *N.L.R.B.* v. *Servette, Inc.*, 377 U.S. 46, 51–54. Legislative history makes it clear that Congress sought to reach all those

[5] The Union also contended that their picketing was not calculated to invite the neutral employees to make common cause by engaging in work stoppages. The Board agreed that proof of "inducement" within the meaning of Section 8(b)(4)(i)(B) was insufficient and the Board dismissed this allegation of the complaint.

forms of union conduct which, unlike mere peaceful persuasion, subject the neutral employer to an effective loss of his freedom of choice by threat of a separate strike, picketing or other like economic retaliation.

Senator McClellan, who introduced the amendment from which subsection (ii) derives, made its applicability to this very case explicit:

> The amendment covers the direct coercion of secondary employers to cause them to cease dealing with or doing business with the primary employer. In other words, if there were a strike in a certain plant, and I, as a merchant, handled the products of that plant, under the amendment the union *could not use picketing* to try to compel me to cease handling the products of the plant where the labor dispute is under way. II *Legislative History of the Labor-Management Reporting & Disclosure Act of 1959*, (G.P.O. 1959), p. 1193 (emphasis supplied).

Thus, the short answer to the Union's argument is that no proof of actual injury or adverse effects is necessary: Congress itself has decided that picketing of a neutral employer, with qualifications discussed *infra,* pp. 18–20, is encompassed by subsection (ii). The Board and the courts in cases arising under this provision, have uniformly interpreted it in a manner consistent with its application here. *N.L.R.B.* v. *International Hod Carriers, etc. Local 1140,* 285 F. 2d 397, 398–399, 402 (C.A. 8) cert. den., 366 U.S. 903; *N.L.R.B.* v. *Highway Truckdrivers and Helpers, Local 107,* 300 F. 2d 317, 320–321 (C.A. 3); *N.L.R.B.* v. *Local 825 Operating Engineers,* 315 F. 2d 695, 697

(C.A. 3); *N.L.R.B.* v. *District Council of Painters No. 48,* 340 F. 2d 107, 111 (C.A. 9); *Building & Const. Trades Council of San Bernardino and Riverside Counties, et al.* v. *N.L.R.B.,* 328 F. 2d 540 (C.A. D.C.).

B. The contention that an existing business relationship between the primary and secondary employees is a prerequisite to finding a Section 8(b)(4)(B) violation

The Union contended before the Board that the finding of a Section 8(b)(4)(B) violation in this case was precluded because the forbidden object described by the Act was to force one person to "cease doing business" with another. Here, the Union asserted, Reimann had already completed his contract before the Union began its picketing at the neutral employers' premises and there was no evidence that the latter had any specific plans to do business with Reimann in the future. Hence, the argument went, no cessation of business object could be shown. The Board rejected this argument, concluding that Section 8(b)(4)(B) does not require an existing business relationship between the picketed neutral employer and the primary employer (J.A. 36). The Board's ruling is plainly correct.

Settled law acknowledges that the central legislative concern in enacting Section 8(b)(4)(B) was "the victim's neutrality" (J.A. 36). As the Board pointed out in its opinion in this case (*ibid.*), restricting the scope of Section 8(b)(4)(B) so as to protect only those neutrals who have an existing business relationship with the employer who is party to the labor dispute would fly in the face of stated legislative purpose. The Union's reliance upon their narrow inter-

pretation of the phrase "cease doing business" hardly justifies such a drastic dilution of the Act. That phrase has never been construed to require an existing business relationship between the primary and neutral employers.

Thus, prior to 1959, the Board had consistently held—with judicial approval—that the protection afforded by the secondary boycott provisions of the Act is not limited to the business dealings between the primary and secondary employer, but extends as well to the business dealings between the secondary employer *and others with whom the secondary does business. Retail Fruit & Vegetable Clerks* v. *N.L.R.B.*, 249 F. 2d 591, 595 (C.A. 9); *N.L.R.B.* v. *Washington-Oregon Shingle Weavers*, 211 F. 2d 149, 151–152 (C.A. 9); *IBEW* v. *N.L.R.B.*, 181 F. 2d 34, 37 (C.A. 2), aff'd, 341 U.S. 694; *N.L.R.B.* v. *International Brotherhood of Teamsters, Local 182*, 219 F. 2d 394, 395–396 (C.A. 2); *Local 450 Operating Engineers* v. *Elliott*, 256 F. 2d 630, 636–638 (C.A. 5).

The Court of Appeals for the District of Columbia thus stated its approval for the Board's broad reading of the "cease-doing-business" term:

> Although it is frequently true that the object of secondary picketing is to obstruct dealings with the primary employer, Congress did not so limit its language. And a moment's reflection establishes that such a limitation would not have been consonant with the central legislative purpose. That purpose was to confine labor conflicts to the employer in whose labor relations the conflict had arisen, and to wall off the pressures generated by that conflict from un-

> allied employers. If one of the latter could with impunity be forced to suspend its business relations with all persons other than the primary employer, the evil which Congress sought to get at would be complete. Many secondary employers would have no occasion to have commercial intercourse with the primary employers. Is it to be supposed that Congress intended that their business could be stopped by secondary pressures simply because of this circumstance? We think not . . . . *Miami Newspaper Pressman's Local No. 46* v. *N.L.R.B.*, 322 F. 2d 405, 410 (C.A. D.C.).

When Congress amended the secondary boycott law in 1959, therefore, it was fully aware of the Board's interpretation. Not only did Congress decline to compel a different interpretation, it took action which rested upon an approval of this broad reading of the Act. Thus, Section 8(e) was enacted in 1959 to close another loophole in the prior law: the execution of agreements between a union and a neutral employer whereby the latter agrees to boycott some other employer with whom the union is principally at odds. The language of Section 8(e), tracking the relevant terms of Section 8(b)(4)(B), refers to agreements to "cease doing business". As this court has already pointed out, Section 8(e) was intended to reach agreements which would operate only upon "future arrangements" as well as those contracts which require a termination of "existing arrangements". *N.L.R.B.* v. *Joint Council of Teamsters No. 38,* 338 F. 2d 23, 26–27 (C.A. 9). In other words, Congress in 1959 treated "cease" and "refrain" as synonymous in

drafting Section 8(e). An existing business relationship is not essential for proving a Section 8(e) violation. It would be anomalous to treat Section 8(b)(4)(B) differently. *National Woodwork Mfrs., supra,* 386 U.S. at 633–639.

In short, the Union's argument before the Board would—if adopted—not only undercut the settled interpretation of the Act, but it would require this step based solely upon the narrow reading of a term, which reading neither Congress, the Board nor the courts have ever previously approved.[6]

Furthermore, the Union's assertion that there was no existing business relationship between Reimann and the picketed neutrals can hardly go unchallenged. To be sure, at the time of the picketing, Reimann and the neutrals had already completed performance of their respective obligations under the construction contracts. But, as the Board pointed out, Northridge—the motel chain operator—and Candelaria—the owner and lessor of retail store buildings—both engage in businesses which expand through the construction of new facilities. And, as a general contractor in the building industry, operating in the same area where Northridge and Candelaria operate, Reimann is within the class of employers to whom

[6] Indeed, the "cease-doing-business" phrase has been read to provide protection for neutrals' business relations even in cases where no identifiable primary employer could be found, or where the union's real target was not an employer at all but, rather, some rival union. *National Maritime Union of America* v. *N.L.R.B.*, 342 F. 2d 538, 542–544 (C.A. 2); *National Maritime Union of America* v. *N.L.R.B.*, 346 F. 2d 411, 416–420 (C.A.D.C.); see *Washington-Oregon Shingle Weavers, supra,* 211 F. 2d at 152.

future construction contracts might be awarded (R. 36–37). In a sense, therefore, a business relationship between Reimann and the neutrals subsists even after the particular building contracts involved here were completed.

It fully comports with settled interpretation of the Act to prohibit the Union from picketing the neutrals to disrupt this surviving business relationship. Otherwise, it would be difficult to explain why the Act should protect neutral employers whose sole connection with the primary employer involves the occasional purchase of the latter's products. But there is no question about such an occasional purchaser's immunity from Section 8(b)(4) pressures, and the law has never considered stripping such a neutral of his protection during those periods of business inactivity between purchases.[7]

C. The contention that the Union's sole object was "informational" and therefore not within the reach of Section 8(b)(4)(B)

In addition to challenging the Board's interpretation of the term "cease doing business," the Union also raised an evidentiary defense. In the Union's view, the record would not warrant a finding that its picketing was for a forbidden object: only "publicity" of its labor dispute with Reimann was intended. Thus,

[7] See, e.g., *Amalgamated Meat Cutters* v. *N.L.R.B.* (*Swift & Co.*), 237 F. 2d 20 (C.A.D.C.), cert. denied, 352 U.S. 1015; *N.L.R.B.* v. *District Council of Painters No. 48*, 340 F. 2d 107 (C.A. 9); *N.L.R.B.* v. *Millmen & Cabinet Makers Union, Local 550, etc.*, 367 F. 2d 953 (C.A. 9); *N.L.R.B.* v. *United Brotherhood of Carpenters, etc.*, 184 F. 2d 60 (C.A. 10), cert. denied, 341 U.S. 947; *N.L.R.B.* v. *Enterprise Ass'n, etc.*, 285 F. 2d 642 (C.A. 2); and cf. *N.L.R.B.* v. *Joint Council of Teamsters No. 38*, 338 F. 2d 23 (C.A. 9).

the Union pointed out, the picket signs did not expressly request anyone to withhold their patronage of the picketed establishment, the Union actually had a labor dispute with Reimann and was entitled to publicize this dispute, and the picketing was confined to buildings actually constructed by Reimann.

The Board concluded, however, that the picketing was not designed solely to publicize the dispute with Reimann. Accordingly, even if that were one of its purposes, the existence of another, unlawful object suffices to warrant the finding of a violation. One unlawful object is enough.[8] And, on this record, we submit, there is ample evidentiary support for the Board's finding that the Union's picketing had a secondary object.

First, it is significant that the picketing in this case occurred at the premises of neutral employers, and at times when only neutrals were present at the sites. Moreover, neither of the picketed neutrals was offering consumers any goods or services produced by the primary employer, Reimann, at the time of the picketing. In these circumstances, of course, any union claim of an effort to confine its picketing so as to focus pressures solely upon the offending employer must have a hollow ring. Thus, even in the common situs cases—where primary and secondary employers share the same geographical location—union picketing has been viewed as secondary where it deliberately enmeshed

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[8] *N.L.R.B.* v. *Denver Building Trades Council*, 341 U.S. 675 688–689; *N.L.R.B.* v. *United Ass'n of Journeymen, etc. Local 469*, 300 F. 2d 649, 651 (C.A. 9); *N.L.R.B.* v. *Milk Drivers & Dairy Employees Local Union No. 584, IBT*, 341 F. 2d 29, 32 (C.A. 2), cert. denied, 382 U.S. 816; *New York Mailers Union No. 6* v. *N.L.R.B.*, 316 F. 2d 371, 372 (C.A. D.C.)

the neutral employer to an extent greater than that required by the mere existence of a common situs. *United Steelworkers* v. *N.L.R.B.,* 294 F. 2d 256, 258–259 (C.A.D.C.) (secondary object inferred from placement of pickets at a location geographically remote from primary employees at the site); *Truck Drivers Local Union 728* v. *N.L.R.B.,* 249 F. 2d 512, 514 (C.A.D.C.) cert. denied, 355 U.S. 958 (secondary object inferred from prior conduct of union, seeking to cause a cessation of business, and from failure of pockets to advise neutral employees of any different object); *Retail Fruit & Vegetable Clerks, supra,* 249 F. 2d at 598 (secondary object inferred from union's decision to picket at a location on the common situs where it could maximize the picketing's pressure against the neutrals). See also, *Orange Belt District Council of Painters No. 48* v. *N.L.R.B.,* 361 F. 2d 70, 71 (C.A.D.C), enforcing 154 NLRB 997.

Moreover, Reimann—the primary employer—also had an office and its principal place of business in Salem, where the Union could have picketed without implicating neutral employers at all. The existence of such a separate primary situs is not necessarily a conclusive indicator of a secondary object, but the Board was surely entitled to give this fact some weight.[9] No other explanation for the Union's decision to picket at the neutral's premises was offered,[10] and the record

[9] *N.M.U.* v. *N.L.R.B.*, 367 F. 2d 171, 176 (C.A. 8), cert. den., 386 U.S. 959 and cased cited; *Brown Transport Corp* v. *N.L.R.B.* 334 F. 2d 30, 37 (C.A. 5); *Truck Drivers Local Union 728, supra.*

[10] To be sure, the "public" is present at this site, too. But it is a special aspect of the public with a unique capacity for causing economic injury to the neutral employers.

suggests no basis for supposing that Reimann's office would have been an ineffectual location to achieve the publicity effect assertedly sought by the Union.

Furthermore, the Union had previously taken action which resulted in a threat by the Oregon State Building & Construction Trades Council to take economic action against one of the neutrals if it did not remove Reimann from the Hyatt Lodge project. The picketing that followed need not be viewed in isolation. While the prior threat of action was never effectuated in the manner specified, the fact remains that the Union commenced its picketing at the neutral employers' premises against a background which plainly illustrated the Union's interest in seeing Reimann boycotted.

It is true, of course, that the language used on the picket signs did not refer to the neutral employers being picketed, nor did it explicitly request their consumers and suppliers to avoid dealing with them. But the language appearing on a picket sign is hardly conclusive. The Board is entitled to consider the location and timing of the picketings, and other surrounding circumstances, in evaluating the Union's real object. Where, as here, those circumstances fairly support a finding of secondary object, the courts have uniformly approved the Board's determination despite the language of the sign. *N.L.R.B.* v. *Millmen & Cabinet Makers Union, Local No. 550, etc.*, 367 F. 2d 953, 955–956 (C.A. 9); *N.L.R.B.* v. *Laundry, Linen Supply, etc., Drivers Local 928*, 262 F. 2d 617 (C.A. 9); Retail *Fruit & Veg. Clerks, supra*, 249 F. 2d at 599–600; *United Steelworkers* v. *N.L.R.B.*, 294 F. 2d 256, 258–259 (C.A.D.C.); *Brown Transport Corp.* v. *N.L.R.B.*,

334 F. 2d 30, 37–39 (C.A. 5); *N.L.R.B.* v. *Int'l Hod Carriers, Local 1140,* 285 F. 2d 397 (C.A. 8), cert. denied, 366 U.S. 903; *N.L.R.B.* v. *Highway Truckdrivers & Helpers Local 107,* 300 F. 2d 317, 321–322 (C.A. 3).

In this case, all potential customers of the picketed retailers would have been required to cross the Union's picket line in order to trade with the retailers. A picket line "is a potent instrument having a special message of its own". *Brown Transport, supra,* 334 F. 2d at 36. There is nothing in the record to suggest that the Union took any action here to cancel the invitation inherent in the picketing itself. As the Board put it, ". . . no steps [were] taken to insure against general economic injury to the building occupants" (R. 38). Indeed, as the Board pointed out, the implication to be drawn from the wording of the picket sign was that the picketed premises were themselves encompassed in the labor dispute.

The evidence summarized above amply justified the Board's determination that the picketing was not solely for an informational purpose: direct economic pressure against the picketed employers, as a tactical device to assist the Union in its dispute with Reimann, could also be inferred. *National Maritime Union* v. *N.L.R.B.,* 367 F. 2d 171, 175–176 (C.A. 8); *N.L.R.B.* v. *Local 254, Building Service Employees,* 359 F. 2d 289 (C.A. 1); cases cited *supra,* p. 16.

If the Board's determination of a secondary object is sustained, the Union's contention of a conflict with the guarantees of free speech in the United States Constitution must consequently be rejected. The Supreme Court long ago decided that there was

"no reason why Congress may not . . . proscribe picketing in furtherance of . . . unlawful objectives." *I.B.E.W.* v. *N.L.R.B.*, 341 U.S. 694, 705. And since it was stipulated that the Union engaged in picketing—as opposed to mere handbilling or other publicity devices—it is clear that the proviso to Section 8(b)(4) which immunizes "publicity, other than picketing, for the purpose of truthfully advising the public . . ." is inapplicable.

D. The contention that the Supreme Court's ruling in *N.L.R.B.* v. *Fruit & Vegetable Packers Local 760 (Tree Fruits)*, 377 U.S. 58, privileges the Union's picketing in this case.

As the foregoing discussion indicates, not all picketing at a neutral employer's premises is violative of Section 8(b)(4)(B). The location of the picketing, although indicative of a union purpose to bring forbidden pressures to bear against the neutral, is not always conclusive proof of such an object. Thus, for example, peaceful picketing at a retailer's store has been defended on the grounds that the sole object is to follow an "unfair" product to its outlet, i.e., to publicize the existence of a labor dispute with the manufacturer of the product and discourage retail consumption of that offending product without creating a separate strike or boycott against the neutral retailer. In *N.L.R.B.* v. *Fruit & Vegetable Packers Local 780 (Tree Fruits)*, 377 U.S. 58, the Supreme Court agreed that such a defense would have merit, but emphasized that the picketing must be "directed only at the struck product" (377 U.S. at 63) whereas "picketing which persuades the customers of a secondary employer to stop all trading with him was . . . barred" (377 U.S. at 71).

Application of the Supreme Court's consumer picketing theory to the facts of this case does not advance the Union's cause; on the contrary, *Tree Fruits* illustrates the propriety of the Board's decision.

The facts in *Tree Fruits* clarify the meaning of the exemption there granted. In that case, the union picketed at a Safeway supermarket in order to persuade customers of that market not to buy the Washington State apples on sale there. The union had no independent labor dispute with Safeway, but it was on strike against distributors of the named brand of apples. Safeway was advised that the picketing was only an appeal to his customers not to buy the "struck" apples, and that the pickets would refrain from any action inconsistent with such a limited objective. *Id.* at 60–61, 73–76. And, in fact, the picketing was so confined. For that reason, the Supreme Court stated, the picketing did not violate Section 8(b)(4)(B). *Id.* at 71.

> When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employers' purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally.

> In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer. (*Id.* at 72).

In the Board's view, the facts of this case present a situation where the picketing does not merely follow the primary dispute but, rather, is employed to persuade customers not to trade at all with the neutrals. As shown in the Statement, *supra,* pp. 3–4, the Union here picketed at the premises of neutral retailers who occupied buildings constructed by the primary employer. The pickets, stationed at consumer entrances, carried signs which announced that the building had been constructed "under sub-standard wages and conditions. . . ."

The Board concluded that

> Even assuming *arguendo* that identification of the building as the subject of the dispute created an appeal for a boycott of the so-called 'product' of the primary employer, such a product boycott would of necessity encompass the entire business of the neutral occupant's premises and therefore the entire business of the secondary employer, and must be said to be "employed to persuade customers not to trade at all with the secondary employers" and "designed to inflict injury on his business generally" (R. 39).

The Board's conclusion is sound and warrants affirmance here.

Every potential customer who approaches a retail establishment and discovers a union picket line is compelled to make a choice. The decision to cross or not to cross the picket line, in the usual situation,

will necessarily determine whether the customer will take sides with the picketed employer or with the picketing union. From the customer's point of view, the decision may be an unpleasant one, he may feel unprepared to decide or reluctant to take sides. But there is—in the typical case—no way to escape taking sides.

Tree Fruits, however, presented a special situation. There the union's conduct at Safeway's retail store premises made it clear to the approaching customer that he could support the union's cause and still patronize Safeway. The appeal of the picketing at Safeway plainly apprised consumers sympathetic to the union that they were being requested to act selectively, to focus their purchasing power in a way detrimental to the primary employer, and not to withhold their patronage entirely from Safeway.

The customers of Hyatt Lodge and Farrell's Ice Cream Parlor, in this case, have no such option. They, like the customers in the typical picketing situation, must necessarily refrain from all dealings with the picketed retailers if they decide to assist the picketing union.

It is true, of course, that the Board's decision contemplates that unions seeking to protest against building contractors will usually be unable to employ the technique of consumer picketing as employed by, for example, a union seeking to protest against an employer who produces merchandise to be sold in retail stores. But this does not demonstrate that the Board's decision is arbitrary. On the contrary, it simply reflects the fact that the Congressional prohibition

against secondary boycotts does not contain a precise catalogue of proscribed tactics. The central concern of the Act is "to confine labor disputes to the employer in whose labor relations the conflict had arisen" (*Miami Newspaper Pressmen, supra,* 322 F. 2d at 410) and to prohibit "pressure tactically directed toward a neutral employer in a labor dispute not his own" (*Woodwork Mfrs.,* 386 U.S. at 623). Hence, the same union tactics which amount to proscribed coercion of a neutral because of the surrounding circumstances in one case need not constitute such coercion in another case where the surrounding circumstances are different. The statute is "not an effort to insure that labor could have in all situations the same kind and extent of impact, that it could obtain in some cases . . ." *Grain Elevator, Flour & Feed Mill Workers, etc. Local 418* v. *N.L.R.B.,* 376 F. 2d 774, 779 (C.A.D.C.).

Likewise, the Board's decision to treat picketing at a common situs with less latitude than picketing at a location occupied solely by the primary employer has been authoritatively approved. *Local 761, IUE* v. *N.L.R.B.,* 366 U.S. 667, 679 and cases cited at 677. It is a fact that such a decision bears more heavily upon unions in the construction industry, where employers typically work at a common situs. But this fact has never been considered a valid defense, since the Board's treatment of common situs cases sensibly accommodates the relevant Congressional objectives. As the Court of Appeals for the District of Columbia Circuit has explained:

> We also realize the difficulty the building crafts have with the secondary boycott provisions of

> the Labor-Management Relations Act, but this court is not the forum in which to seek relief from what the union characterizes as 'the shackles' of this statute. *Local No. 5, United Ass'n, etc.* v. *N.L.R.B.*, 321 F. 2d 366, 370 (C.A. D.C.), cert. denied, 375 U.S. 921.

By the same token, we submit, the Board's instant decision should not be disturbed merely because it will bear more heavily upon some unions than others. Nothing in the Supreme Court's *Tree Fruits* decision suggests that such a result is improper. On the contrary, *Tree Fruits* contemplates that consumer picketing will be subject to the Act's prohibition whenever, as here, the picketing "is employed to persuade customers not to trade at all with the secondary employer." 377 U.S. at 72.

CONCLUSION

For the reasons stated, we respectfully submit that the Court should enter a decree enforcing the Board's order in full.

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AUGUST 1967.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151, *et seq.*) are as follows:

> Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * *
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: * * *
>
> *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has

a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

Sec. 8 (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided,* That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection (e) and section 8 (b)(4)(B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

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